STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2053

State of Minnesota,
Respondent,

vs.

Todd Jeffrey Kadel,
Appellant.

Filed January 4, 2011
Affirmed
Shumaker, Judge

Otter Tail County District Court
File No. 56-CR-08-3842

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

David J. Hauser, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie Lee Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

Appellant contends that his convictions of possession and sale of methamphetamine were based solely on the uncorroborated testimony of an accomplice and that the district court committed plain error by failing to instruct the jury as to accomplice testimony. He also argues that the district court erred by allowing evidence seized under a defective search warrant and that there was no evidence that he possessed the seized items. We affirm.

FACTS

A jury found appellant Todd Jeffrey Kadel guilty of possession and sale of methamphetamine. He claims that the evidence does not support his convictions and, in particular, that the convictions were based on the uncorroborated testimony of an accomplice, J.B. He also contends that the district court erred in allowing evidence seized under a search warrant based on misrepresentations and that the court erred in failing to instruct the jury as to accomplice evidence.

In October and November 2008, officers with the West Central Drug Task Force conducted controlled methamphetamine buys through the use of confidential informants (CIs) wearing "wires" that enabled the police to monitor the CIs' conversations. Various people, including Kadel, were involved in the sales transactions.

The first buy took place on October 22, when a CI contacted A.J. under the guise of wanting to buy methamphetamine. The CI then met with A.J. and S.A. and the three went to J.B.'s residence. In one of the monitored conversations, S.A. stated that her

supplier was a woman whose boyfriend was named Kadel. The police saw two females leave the residence and drive to a parking lot behind a laundromat. J.B. testified that Kadel lived in an apartment above the laundromat and that, on October 22, she and S.A. drove to Kadel's apartment, obtained 1.7 grams of methamphetamine from him, and later sold all but 0.4 grams to the CI.

The police arranged a second buy on November 10. A CI went to J.B.'s residence and asked to buy methamphetamine. J.B. said that she had none but could get some. She testified that she then drove to Kadel's residence, obtained methamphetamine from him, and sold 5.8 grams to the CI. J.B.'s cell phone records for November 10 revealed eight calls to a cell phone later found in Kadel's possession.

A third controlled buy, on November 13, involved a CI and C.B. C.B. drove to Kadel's apartment, returned 20 to 25 minutes later, and sold 3.5 grams of methamphetamine to the CI. At the trial, C.B. testified that she obtained the drug from M.W., Kadel's girlfriend.

The final buy occurred on November 14. The police watched a CI go into J.B.'s residence and then saw J.B. leave. They followed her to Kadel's apartment but did not complete their surveillance of her at that location. They later saw her return to her residence where she sold 6.5 grams of methamphetamine to the CI. J.B.'s cell phone records showed three calls on that day to the phone found in Kadel's possession.

Upon the information acquired in the controlled buys, the police obtained a warrant to search Kadel's apartment, and they executed it on November 15. At the apartment, police encountered J.B. and two children, including M.W.'s ten-year-old

child. Kadel was hiding in a closet in the bedroom. When the police ordered him to come out, he dived onto the bed, where the police found 11.1 grams of methamphetamine. The police seized a total of 87.2 grams of methamphetamine from the apartment, some of which was found near where J.B. was sitting when they entered. In addition to methamphetamine, the police seized a large amount of currency, Kadel's cell phone, a police scanner with a list of frequencies for law-enforcement agencies, plastic baggies, syringes, digital scales, and other items characterized as "indicia of drug trafficking."

At the trial, J.B. testified that she had purchased methamphetamine three times from Kadel between October 22 and November 14, 2008, and that Kadel and M.W. both sold methamphetamine. Kadel claimed that he only used the drug and that M.W. was the seller. M.W. confirmed Kadel's statements in her testimony.

D E C I S I O N

Accomplice Testimony

The threshold question in this appeal is whether J.B., the state's principal witness, was Kadel's accomplice in the commission of the crimes of which the jury found Kadel guilty. If J.B. was an accomplice, two rules apply. First, Kadel could not be convicted on the basis of J.B.'s inculpatory testimony unless other evidence in the case corroborated her testimony. *See* Minn. Stat. § 634.04 (2008); *State v. Lemire*, 315 N.W.2d 606 (Minn. 1982). Second, if J.B. was Kadel's accomplice, the district court was required to instruct the jury as to the necessity of corroboration. *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002).

The district court did not find J.B. to have been Kadel's accomplice and, therefore, did not instruct the jury as to the corroboration requirement. Kadel contends that the district court erred in both respects and that there is no evidence that corroborated J.B.'s testimony. Whether the facts of a case show that a witness was an accomplice of the accused is a question of law that we review de novo. *See State v. Bunde*, 556 N.W.2d 917, 918 (Minn. App. 1996) (stating that the district court's application of statutory criteria to the facts is a question of law subject to de novo review); *see also O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (stating that the application of a statute to undisputed facts is a legal question appellate courts review de novo).

"An accomplice is one who could have been charged with and convicted of the crime with which the accused is charged." *State v. Vasquez*, 776 N.W.2d 452, 457 (Minn. App. 2009) (quoting *State v. Swanson*, 707 N.W.2d 645, 652 (Minn. 2006)). Kadel was charged with, and ultimately convicted of, among other things, sales of methamphetamine under Minn. Stat. §§ 152.021, subds. 1(1), 3(a), .022, subds. 1(1), 3(a) .023, subds. 1(1), 3(a) (2008). The statutory definition of "sale" includes selling, delivering, or distributing a controlled substance to another person. Minn. Stat. § 152.01, subd. 15a(1) (2008).

J.B., Kadel's purported accomplice, was charged with sales of methamphetamine under the same statutory section as Kadel was charged under, and he thus argues that J.B. fits the definition of "accomplice." The state contends that J.B. was not Kadel's accomplice because she "could not possibly have been indicted and convicted for [Kadel's] sale of methamphetamine to her."

A person may be criminally liable either by directly committing a crime or by intentionally aiding and abetting the commission of that crime. Minn. Stat. § 609.05, subd. 1 (2008); *State v. Pendleton*, 759 N.W.2d 900, 907 (Minn. 2009). "An 'accomplice' is one who is guilty of complicity in [the] crime charged, either by . . . aiding and abetting in it, or having advised and encouraged it . . . ." *Black's Law Dictionary* 16 (5th ed. 1979).

In an illegal sale of drugs, the buyer is not an accomplice of the seller. *State v. Swyningan*, 304 Minn. 552, 556, 229 N.W.2d 29, 32 (1975). Additionally, "where the acts of several participants are declared by statute to constitute separate and distinct crimes, the participants guilty of one crime are not accomplices of those who are guilty of a separate and distinct crime." *Id.*

As one who aids and abets the direct commission of a crime by another, the accomplice becomes criminally liable for the crime the other committed. The pattern jury instruction on accomplice testimony is illustrative of this point when it states that "a person who could be charged for the *same* crime [as that of the accused] is called an accomplice." 10 *Minnesota Practice*, CRIMJIG 3.18 (2006) (emphasis added); *see State v. Harris*, 405 N.W.2d 224, 231 (Minn. 1987) (supreme court expressly approving instruction patterned after CRIMJIG 3.18).

As noted above, J.B. could not be considered an accomplice as Kadel's buyer. The charges against her were based on her own sales of drugs to the CIs rather than on any act accessory to Kadel's drug sales. There is no evidence that Kadel either intended to distribute drugs through J.B. to an ultimate buyer or that he knew that J.B. would resell

the drugs to another. Thus, two separate and distinct sets of crimes occurred—Kadel's sales to J.B. and J.B.'s sales to the CIs—albeit all violated the same controlled-substance laws.

The "separate-and-distinct-crimes" rule applies here, and *Swyningan* is controlling authority. In that case, Leon Wagner arranged a sale of heroin to a person acting as a police informant. Wagner drove the informant to a meeting place for a sale by Swyningan. At that location, Swyningan handed a beer can containing heroin to the informant who in turn gave Swyningan money. Wagner and the informant went to a residence at which the informant skimmed some of the heroin and she and Wagner "shot up." She gave the rest to the police.

Swyningan was charged with the unlawful distribution of heroin. At Swyningan's trial, Wagner asserted his privilege against self-incrimination and did not testify. The informant testified for the state. Swyningan contended that the informant was his accomplice when she distributed heroin to Wagner, and, therefore, he could not be convicted upon her uncorroborated testimony. The supreme court held that the informant's distribution to Wagner "was a separate and distinct transaction from the distribution for which [Swyningan] has been charged," and, therefore, the informant and Swyningan were not accomplices of each other. *Swyningan*, 304 Minn. at 556, 229 N.W.2d at 33. Like the three-party distribution circumstances of *Swyningan*, here Kadel distributed drugs to J.B., who then distributed the drugs to CIs.

Kadel points to *Vasquez* as "instructive." In *Vasquez*, A.E.W. contacted Robert Chapman and asked him to arrange for her to obtain heroin. She then drove with

Chapman to a location at which Vasquez was present. A.E.W. and Chapman each contributed $20 for the purchase of heroin. Vasquez set a small baggie of heroin on the center console inside A.E.W.'s car. Chapman then mixed the heroin with water, heated it with a lighter, filled some needles, and handed the mixture to A.E.W. She soaked her needle in it and injected herself. She fell into unconsciousness and died later from a drug overdose. *Vasquez*, 776 N.W.2d at 455.

The state charged Vasquez with "third-degree controlled substance murder" for causing A.E.W.'s death by selling an illegal drug to her. At his trial, Vasquez argued that Chapman was his accomplice and that the only evidence against him was Chapman's uncorroborated testimony. *Id.* at 456.

Concluding that Chapman was Vasquez's accomplice, the court of appeals explained that Chapman "played a more active role than a mere drug user and served as a link in the chain of distribution." *Id.* at 459. The court did not apply the *Swyningan* rule nor did it cite that case. In our view, *Vasquez* is not instructive on the question of who is an accomplice and, at least to some extent, it is at odds with the precedential "separate-and-distinct-crime" rule reaffirmed in *Swyningan*. Although Chapman surely fit the definition of accomplice by arranging the sale of heroin and accompanying A.E.W. to the location of the sale, his later preparation and distribution of the heroin mixture that killed A.E.W. was a separate distribution crime from that of Vasquez.

We hold that, as a matter of law, J.B. was not Kadel's accomplice in J.B.'s sales of methamphetamine to CIs. Thus, the district court did not err by failing to give an

accomplice-testimony instruction, and there was no requirement that J.B.'s testimony had to be corroborated to support Kadel's conviction.

Search Warrant Deficiencies

Kadel contends that the district court erred in denying his motion to suppress evidence seized from his residence on the basis of a search warrant supported by an affidavit that contained omissions and misrepresentations. Innocent and even negligent misrepresentations will not invalidate a search warrant. *State v. McGrath*, 706 N.W.2d 532, 540 (Minn. App. 2005). But a warrant may be invalidated if a preponderance of the evidence shows that the affiant has knowingly, or with reckless disregard for the truth, made false material statements in the affidavit. *Id.*

Kadel points out that the district court made no finding as to whether any of the affiant's omissions or misstatements were intentional, and he argues that, because the affiant was an experienced law-enforcement officer with drug training and experience, his misstatements and omissions were reckless because he should have known the relevance of the particulars of his affidavit. We are not persuaded by Kadel's mere contention that an affiant's prior experience supports an inference by a preponderance of the evidence that misstatements in or omissions from his affidavit were intentional or made with reckless disregard for the truth. Thus, we proceed on the premise that if there were inaccuracies in the affidavit, they were inadvertent or merely negligent.

Probable cause for the issuance of a warrant to search a person's residence requires facts that show that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Souto*, 578 N.W.2d 744, 747 (Minn.

1998). Those facts must also show "a direct connection or nexus between the crime alleged" and the place to be searched. *Id.* In assessing probable cause, we consider the totality of the circumstances disclosed in support of the warrant. *Id.*

Kadel claims that the affiant's inaccuracies "were material because, after setting aside the misstatements and supplying the omissions, the affidavit as modified does not establish a direct connection or nexus to Kadel's residence."

There were three alleged misstatements in the affidavit. In summary, they were that J.B. and S.A., not J.B. and her daughter, drove to the location of the first buy; the CI gave J.B. $300, not $400, and J.B. gave $70 back to the CI; and the affiant did not contact the owner of Kadel's apartment building on the day the affiant applied for the warrant but contacted her earlier, because the owner was out of town that day. There were four alleged omissions, namely, while J.B.'s car was parked near the buy location an unidentified person got in; the affiant could not take photos of a female leaving the CI's car and going toward or returning from the apartments where the buys occurred; J.B. was out of sight for nearly 45 minutes during one of the buys; and on the way to another buy, C.B. stopped to pick up a TV.

Even without the alleged misstatements and with the addition of the alleged omissions, the affidavit describes four controlled drug sales from the apartment building where Kadel resided. None of the alleged inaccuracies is sufficiently relevant to defeat a finding of probable cause when the totality of the circumstances is considered. Thus, we hold that the district court did not err in denying Kadel's motion to suppress the evidence seized at his residence.

Possession of Methamphetamine

Kadel contends that the jury had insufficient evidence to find he possessed 25 or more grams of methamphetamine and had intent to sell 10 or more grams of methamphetamine. We review the evidence in the light most favorable to the verdict. *State v. Steinbuch*, 514 N.W.2d 793, 799 (Minn. 1994). We will uphold a jury's verdict if the jury could reasonably have found the defendant guilty. *State v. Pierson*, 530 N.W.2d 784, 787 (Minn. 1995).

A conviction for unlawful possession of a controlled substance requires that the defendant either physically or constructively possess the substance. *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975). None of the methamphetamine was found in Kadel's actual possession at his arrest. To show a person's constructive possession where he shares control with another over the area in which a controlled substance is found, there must be a strong probability that he physically possessed it at one time and continued to exercise dominion and control over it until his arrest. *Id.* at 105, 226 N.W.2d at 610-11. "A person may constructively possess drugs jointly with another person." *State v. Barnes*, 618 N.W.2d 805, 812 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001).

Although M.W. testified that the drugs seized belonged to her and that Kadel merely used some of them, her credibility was an issue for the jury to resolve. *See State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). The jury found M.W.'s testimony unreliable, and we defer to that determination. *See State v. Cusick*, 387 N.W.2d 179, 181

(Minn. 1986) (defendant found to have constructively possessed cocaine despite his girlfriend's testimony that the cocaine belonged to her).

The police found 87.2 grams of methamphetamine in various places throughout the apartment. They also found bundles of currency around the apartment. There was one bedroom and one bed, and all other areas of the apartment appeared to be under the joint control of Kadel and M.W. There was testimony that both M.W. and Kadel sold drugs. We hold that the evidence was sufficient to support the verdicts.

Affirmed.